

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 July 2018

Public Authority: Local Government and Social Care Ombudsman
Address: PO Box 4771
Coventry
CV4 0EH

Decision (including any steps ordered)

1. The complainant has requested information relating to the number of complaints and judicial reviews the LGSCO has handled as an organisation, at the Coventry office and by or relating to one member of staff. The LGSCO provided the information it holds and confirmed that it considers the information relating to the named member of staff is exempt from disclosure under section 40 of the FOIA.
2. The Commissioner is satisfied that section 40 of the FOIA applies to the withheld information and that all other recorded information that is held falling within the scope of this request has been provided to the complainant. However, she has recorded a breach of section 1 and 10 of the FOIA, as the LGSCO failed to provide information to which the complainant was entitled to receive within 20 working days of the request.
3. The Commissioner does not require any further steps to be taken.

Request and response

4. On 20 December 2017, the complainant wrote to LGSCO and requested information in the following terms:

"After researching the way the LGO deal with complaints I require the following

All time scales are for how long [name redacted] has been with your organisation ie 1 year, 2 years, six years however long he has been with you for.

How many complaints have been lodged broken down by nationally, Coventry office and finally [named redacted]?

How many were investigated broken down by nationally, Coventry office and finally [name redacted]?

How many were upheld (ie the public won) broken down by nationally, Coventry office and finally [name redacted]?

How many deal with Birmingham city council and then broken down by nationally, Coventry office and finally [name redacted] and how many were upheld?

How many judicial reviews were lodged:

how many were reinvestigated and the decisions changed or not changed

How many were reinvestigated broken down by after letter of intent, court date issued and judges ruling.

Again broken down by nationally, Coventry office and finally [named redacted]."

5. The LGSCO partially responded on 12 January 2018. With regards to all information requested relating to the member of staff quoted in the request, the LGSCO confirmed that it considered this information to be exempt from disclosure under section 40 of the FOIA. In respect of the statistics requested for separate offices, it confirmed that it does not hold office-based statistics only statistics as an organisation. The LGSCO confirmed that it would issue a further response shortly to provide the national statistics requested and the information requested about judicial reviews. Concerning the information requested about Birmingham City Council, the LGSCO provided the complainant with a link to the requested information available on its website.
6. The LGSO issued a further response on 19 January 2018. This provided the national statistics held for the time period specified in the complainant's request and the information he requested concerning judicial reviews.
7. The complainant requested an internal review on 15 January 2018.

8. The LGSCO carried out an internal review and notified the complainant of its findings on 12 February 2018. It confirmed that it did not uphold the complainant's appeal and considered his request had been handled appropriately and in accordance with the FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 21 February 2018 to complain about the way his request for information had been handled.
10. The Commissioner wrote to the complainant on 11 April 2018 to ask him to confirm which elements of his request he remains dissatisfied with. The complainant responded on 11 April 2018 confirming that he remains dissatisfied for the following reasons:
 - (a) The LGSCO is unable to provide the statistical information by office. He stated that someone had posted on a website the very same information for previous years and supplied the Commissioner with a link to the relevant website.
 - (b) The LGSCO is unwilling to disclose the requested information relating to the member of staff quoted in his request and disagrees that section 40 of the FOIA applies. He stated that information about him and his family was disclosed to the member of staff during the investigation that was carried out that was neither relevant or needed and he considers the role the member of staff holds has affected a large number of people negatively.

Towards the end of the Commissioner's investigation the complainant also raised concerns about the information the LGSO disclosed in relation to the judicial reviews that were lodged. Specifically he stated that:

- (c) The LGSCO had not disclosed how many were reinvestigated after they received a letter of intent, how many were reinvestigated after the court date set and how many were reinvestigated after the judge's ruling.
11. Towards the end of the Commissioner's investigation it came to light that the LGSCO does in fact hold the statistical information for the Coventry office. It therefore disclosed to the complainant the number of complaints investigated, upheld and not upheld in relation to the Coventry office. In terms of the number of complaints lodged, it advised that all complaints received are lodged by the Coventry office so the national statistics already referred to the complainant for the number of complaints lodged is essentially the same as the number of complaints

lodged by the Coventry office, as this is where this element of the process is carried out and no other office lodges the complaints as they come in.

12. As a result of this very recent disclosure of information, the remainder of this notice will address elements (b) and (c) of paragraph 10 above only.

Reasons for decision

Section 40 – personal data

13. Section 40 of the FOIA states that a public authority may refuse to disclose information if it constitutes the personal data of a third party and the disclosure of that information would breach any of the data protection principles outlined in the Data Protection Act 1998 (DPA 1998).
14. It must be noted first of all that the Data Protection Act 1998 has been superseded by the Data Protection Act 2018. However, as this request was made whilst the 1998 Act was in force and the LGSCO considered the application of section 40 of the FOIA in conjunction with the 1998 Act because this was the Act in force at that time, it is the 1998 Act the Commissioner will also consider in this notice.
15. In the DPA 1998 personal data is defined as:

...“data which relate to a living individual who can be identified-

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

And includes any expression of opinion about that individual and any indication of the intentions of the data controller or any other person in respect of the individual...”
16. The Commissioner considers the first data protection principle outlined in the DPA 1998 is most relevant in this case. The first data protection principle states -

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”

17. The Commissioner must first consider whether the requested information is personal data. If she is satisfied that it is, she then needs to consider whether disclosure of this information would be unfair and unlawful. If she finds that disclosure would be unfair and unlawful the information should not be disclosed and the consideration of section 40 of the FOIA ends here. However, if she decides that disclosure would be fair and lawful on the data subject(s) concerned, the Commissioner then needs to go on to consider whether any of the conditions listed in schedule 2 and 3, (sensitive personal data) if appropriate, of the DPA are also met.

Is the requested information personal data?

18. The complainant has requested information relating to the number of complaints lodged and investigated by a particular member of staff. The complainant also asked for information relating to judicial reviews that involved this member of staff. The Commissioner considers the member of staff could be potentially identified from this information and other information held by the LGSCO and is information that 'relates to' their personal performance in work. She is therefore satisfied that the requested information constitutes the personal data of the member of staff referred to in this request.

Would disclosure be unfair?

19. First it is important to highlight what disclosure under the FOIA means. Disclosure under the FOIA is to the world at large for anyone to see and with very limited restrictions on the use of that information. The relevant consideration is not whether the information can be disclosed to the applicant but whether the information can be released into the public domain.
20. The LGSCO has said that the requested information represents a measure of the employee's performance at work and all employees hold the reasonable expectation that such information will remain private and confidential between them as employee and the LGSCO as employer. It stated that the employee named in the request would have no expectation that information relating to their performance as work could be disclosed into the public domain and for these reasons it considers disclosure under the FOIA would be unfair.
21. The Commissioner is satisfied that the employee named in the request would have no expectation that the requested information could be disclosed into the public domain. Instead she considers the employee

would have the expectation that the requested information would remain private and confidential between themselves and the LGSCO as their employer and that such expectations are reasonable and fair. The Commissioner is of the viewpoint that disclosure would be unfair and an unwarranted intrusion into the more private aspects of their employment. It could potentially cause them distress and upset and if there were any issues with their performance (and the Commissioner is not stating in this case that there is; this is purely hypothetical) potential detriment to their future career.

22. The LGSCO has said that the employee named in the request operates a public facing role in their professional capacity as an investigator. But they are not regarded as a senior member of staff and ultimately responsibility for all decisions made rests with the Ombudsman himself. It explained how staff work under the Ombudsman's delegated authority following corporate guidance on processes and procedures in making their decision. The LGSCO therefore stated that this, therefore, means that any unhappiness with regards to how a complaint has been investigated is about the actions of the Ombudsman service as a whole; not the individual investigator. It also commented that in the complainant's case the investigator's decision was reviewed and upheld by a manager in a different team and so the decision that was reached was confirmed corporately. The LGSCO advised that any further action would be against the Ombudsman as an organisation and not an individual case investigator. It therefore concluded by saying that it could see no justification for the disclosure of this information.
23. The Commissioner considers any legitimate public interest in the disclosure of the requested information is very limited in this case for the reasons the LGSCO has given above. And any limited legitimate public interest in disclosure is outweighed by the unfairness, distress and upset disclosure would cause to the employee concerned.
24. The employee named in the request acted under the delegated authority of the Ombudsman himself. Any complaint about how a case has been investigated is about the actions of the Ombudsman service as a whole; not an individual investigator. Individual statistics about how many cases an investigator has handled, how many judicial reviews have been made against any cases they have handled and how many have been reinvestigated is of a little public interest considering the delegated authority each investigator acts under and the Ombudsman himself being ultimately responsible for all decisions that are made. Organisation wide statistics about how many cases have been investigated, how many have been reinvestigated and how many judicial reviews there has been is of more benefit or wider public interest and the Commissioner notes that such information has been disclosed.

25. For the above reasons the Commissioner is satisfied that disclosure of the requested information would be unfair and in breach of the first data protection principle outlined in the DPA 1998. It therefore follows that the Commissioner is therefore satisfied that section 40 of the FOIA applies in this case.

Information relating to judicial reviews

26. Towards the end of the Commissioner's investigation the complainant raised concerns about the information that was disclosed in relation to judicial reviews. Specifically he stated that the LGSCO had not disclosed how many were reinvestigated after they received a letter of intent, how many were reinvestigated after the court date set and how many were reinvestigated after the judge's ruling.
27. The LGSCO explained that the Pre-Action Protocol for Judicial Review recommends that both parties try to resolve the matter before going to court, but this depends on the nature of the case in question. The LGSCO issues a decision and then there is the option for a complainant to seek a post decision review. After this there is no other way to seek remedy other than to seek permission of the courts for a judicial review.
28. It stated that from the Civil Procedure Rules it assumes that the complainant's reference to 'letter of intent' is actually the "letter before claim" which would be sent to the LGSCO to notify it that a complainant is seeking judicial review. The LGSCO would not, and has not re-opened a case on receipt of a letter of claim, nor would it do so on being advised of a court hearing date. The LGSCO would attend the hearing and defend its position, which it has successfully done in all cases falling within the scope of the request. It confirmed that it is for this reason that it has not re-opened any of its cases.
29. It went on to say that just to be clear, a judicial review looks at the lawfulness of the LGSCO's decision and the procedure used, rather than the actual conclusion that it reached. If the LGSCO were to fail to defend its position at judicial review, it would take any action required by the court, which may or may not require re-opening a case.
30. The Commissioner considers the LGSCO has sufficiently explained why it would not (and therefore has not) 'reinvestigated' or 'reopened' any investigation on receipt of a claim or on receipt of a court hearing date. It has also explained that all judicial reviews were successfully defended so none have been 'reinvestigated' or 'reopened' after the judge's ruling.
31. The Commissioner is satisfied that the information falling within the scope of the complainant's original request has been provided and the LGSCO's response that none have been 'reinvestigated' or 'reopened'

after the letter of claim, date of hearing or judge's ruling is an appropriate response to issue under the FOIA for the above reasons.

32. As the Commissioner is satisfied that the LGSCO has met its obligations under the FOIA in relation to this element of the request, she requires no further action to be taken.

Procedural matters

33. The LGSCO realised towards the end of the Commissioner's investigation that it did in fact hold the requested information for the Coventry office. It apologised for not identifying this sooner and disclosed this information to the complainant on 5 July 2018.
34. As the LGSCO failed to identify that it did hold this information and therefore failed to provide it to the complainant in accordance with section 1 of the FOIA within 20 working days of receipt of the request, the Commissioner has recorded a breach of section 1 and 10 of the FOIA against the LGSCO.

Right of appeal

35. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

36. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
37. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Samantha Coward
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